LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 25 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 946.

FRANK VELOTTA,
Petitioner,

vs.

JAMES J. McGETTRICK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

DON DEROCCO,
1306 Citizens Bldg.,
Cleveland, Ohio,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-3647

TABLE OF CONTENTS.

Opinions Below ---------- 2

Jurisdiction ---------- 2

Questions Presented ---------- 3

Constitutional Provisions Which the Case Involves -- 3

Statement of the Case ---------- 4

Arguments Relied on For the Allowance of the Writ 5

Conclusion ---------- 7

Appendix:

Opinion of the Court of Common Pleas of Cuyahoga County ---------- 8

Journal Entry of the Court of Common Pleas ---- 9

Journal Entry of the Court of Appeals ---------- 10

Order of the Supreme Court Overruling Motion For an Order Directing the Court of Appeals For Cuyahoga County to Certify Its Record --- 10

Order of the Supreme Court Denying Rehearing 11

TABLE OF AUTHORITIES.

Constitution.

Constitution of the United States:

Art. I, Sec. 9 ---------- 2, 3

Art. IV, Sec. 2 ---------- 2, 3, 6

Fifth Amendment ---------- 2, 3

Fourteenth Amendment ---------- 2, 3, 4

Statutes.

28 U. S. C. A. 1257 (3) ---------- 2

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. _____.

FRANK VELOTTA,

Petitioner,

vs.

JAMES J. McGETTRICK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in this cause on November 3, 1965, denying petitioner's application for a rehearing of the petitioner's motion for an order to direct the Court of Appeals for Cuyahoga County, Ohio, to certify its record which was overruled on October 6, 1965.

OPINIONS BELOW.

The order of the Court of Common Pleas of Cuyahoga County denying the petitioner's application for a Writ of Habeas Corpus is unreported and it is printed in the Appendix, *infra*, p. 9.

The order of the Court of Appeals of Cuyahoga County, Ohio, affirming the order of the Court of Common Pleas of Cuyahoga County is unreported and is printed in the Appendix, *infra*, page 10.

The order of the Supreme Court of Ohio, overruling petitioner's motion for an order to direct the Court of Appeals for Cuyahoga County, Ohio, to certify its record, dated October 6, 1965, is unreported and is printed in the Appendix, *infra*, page 10.

The order of the Supreme Court of Ohio, dated November 3, 1965, denying petitioner's application for a rehearing of said Motion to Certify is unreported and is printed in the Appendix, *infra*, page 11.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. C. A. 1257 (3) which section pertinently provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows: * * * (3) By Writ of Certiorari * * * for any title, right, privilege or immunity especially set up or claimed under the Constitution."

This cause involves a violation of Article I, Section 9 and of Article IV, Section 2, and of the Fifth and Fourteenth Amendments of the United States Constitution.

QUESTIONS PRESENTED.

1. Does Article IV, Section 2 of the United States Constitution, when read in *pari materia* with Article I, Section 9, and the Fifth and Fourteenth Amendments of the United States Constitution, authorize or require the accused, in Habeas Corpus proceedings brought to prevent his extradition, to bear the burden of proof on the issue as to whether he is a fugitive from justice?

2. What effect should the Trial Court give to evidence adduced by the accused in Habeas Corpus proceedings brought to prevent his extradition, when such evidence tends to prove that he was not in the demanding state at the time of the alleged crime?

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

The pertinent portions of the provisions of the United States Constitution here involved are set forth below:

"* * *

A person charged in any State with Treason, Felony or other Crime, who *shall flee from Justice,* and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." (Article IV, Section 2, U. S. Constitution.)

"* * *

The Privilege of the Writ of Habeas Corpus shall *not* be suspended, unless when in cases of Rebellion or Invasion the Public Safety may require it." (Article I, Section 9, U. S. Constitution.)

"nor shall any person * * * *be deprived of life, liberty, or property, without due process of law;* * * *." (Amendment V, U. S. Constitution.)

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U. S.; *nor shall any state deprive any person of life, liberty or property without due process of law;* nor deny to any person within its jurisdiction *the equal protection of the law.*" (Amendment XIV, U. S. Constitution.)

STATEMENT OF THE CASE.

On June 18, 1964, the Governor of Ohio issued a Warrant for the arrest of the petitioner for extradition to the State of Florida on a requisition from the Governor of Florida.

A petition for a Writ of Habeas Corpus was filed thereafter in the Common Pleas Court of Cuyahoga County, Ohio, which after hearing, was denied.

At this hearing the appellant introduced positive and probative evidence by the testimony of five witnesses besides himself that he was in Cleveland, Ohio, where he resides, during the entire time pertinent to the inquiry, and that he has never been in Florida.

Two police officers testified for the State. One claimed that he saw the petitioner at the scene of the crime, and the other claimed that he saw the petitioner at another place not far from the scene of the crime.

At the close of the hearing, the Trial Court denied the writ of habeas corpus in a brief oral opinion, the text of which is set forth in the Appendix, *infra,* page 9.

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

As will be observed from an examination of the Trial Court's brief opinion, it did *not* attempt to *weigh* the evidence which was adduced in behalf of the petitioner in relation to that of the State.

Nowhere in its opinion did the Trial Court indicate that it had given consideration to the evidence of the petitioner to the effect that he was in Cleveland, Ohio, at all times pertinent to the issues.

Rather it directed *all* of its attention and consideration to the testimony of the State's witnesses, and it relied on said testimony exclusively in making its decision.

To illustrate, we herewith set forth the following excerpts from its opinion:

> "* * * counsel for defendant has conceded that extradition proceedings are regular in all respects except that he claims that the client wasn't in the State of Florida and not in the county where the crime is alleged to have been committed at the time alleged. (Record 131)
>
> That is the sole question before this court, and even *that question is not determined on its merits by this court.*" (R. 131)
>
> * * * * *
>
> "The sole question here is whether the identity of the defendant has been established, and *there is substantial credible evidence* to that effect; and I must, therefore, deny the application for habeas corpus, and order that Frank Velotta be surrendered to the Florida authorities forthwith." (R. 132)

It is apparent from these excerpts and the opinion of the Trial Court as a whole, that it labored under a misapprehension as to the duty which it had to perform under the constitutional provisions hereinbefore referred to.

This misapprehension was evidently due to the failure of the Trial Court to realize that the "due process" provisions of the constitution are *constant factors* even in proceedings in which extradition is sought.

The concept of "due process" under our constitution should not vary, simply because it is *claimed* that a person is within the contemplation of Article IV, Section 2 of the Constitution, which provides for the extradition of fugitives from justice.

Under this concept, persons who are alleged to be "fugitives from justice" should be accorded the right to have their *status* determined on the basis of *all* of the evidence *when properly weighed, free from artificial presumptive impediments* which result in depriving them of the benefit of their evidence.

Too often, as in the instant case, courts have disregarded evidence such as the petitioner presented in the instant case, on the mistaken assumption that such evidence, *no matter how credible*, is not probative on the issue as to whether the accused is a fugitive from justice, because it also has the effect of establishing his innocence.

While it is true that a person may be innocent and still be a fugitive from justice, it does *not* follow that evidence should be disregarded because it establishes both the fact that the person is not a fugitive from justice and also that he is innocent of the charge for which extradition is sought.

It logically follows that the Trial Court should have considered and weighed the petitioner's evidence together with the evidence of the State in making its determination; that in not doing so it deprived the petitioner of his constitutional rights of habeas corpus and due process.

CONCLUSION.

The question of law involved in this cause should be reexamined and redetermined in the light of modern legal thinking as to the individual's rights under the United States Constitution.

We therefore urge this Honorable Court that a Writ of Certiorari be issued by this Court to the Supreme Court of Ohio to the end that the judgment of that Court may be reviewed and reversed.

Respectfully submitted,

DON DEROCCO,
Counsel for Petitioner.

APPENDIX.

OPINION OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY.

The Court: This Court is not called upon to pass upon the guilt or innocence of anyone here, and there have been extradition proceedings; and I gather from the testimony received here today that all of these witnesses appeared before the Governor at the hearing, in the original hearing where the extradition takes place.

After hearing the evidence, the Governor issued the warrant, and I understand that the law is that in the absence of showing to the contrary that it is presumed that when the Governor issues a warrant on the request of a sister state, counsel for defendant has conceded that extradition proceedings are regular in all respects except that he claims that the client wasn't in the State of Florida and not in the county where the crime is alleged to have been committed at the time alleged.

That is the sole question before this Court, and even that question is not determined on its merits by this Court.

There has been substantial and credible evidence by two officers from Florida that he was in that state and in that county at the time alleged in these extradition proceedings, and whether a court or a jury, or, in the absence of a jury, the court could find on the basis of this evidence the alleged fugitive wasn't guilty is not to be decided at this time.

However, there is substantial probative evidence that he was in the State of Florida and in the County in which the crime was alleged to have occurred at or about the time of the alleged breaking and entering, and that is all I am required to do, and these proceedings have been extremely narrow.

In 170 O. S. 151, *In re Harris,* our Supreme Court has said—the Court sets forth the duties of this Court, which are:

(1) Determine whether an offense is charged under the laws of the state demanding extradition;

(2) Whether the identity of the person charged is established;

(3) Whether the person charged is a fugitive from justice or has committed an act in Ohio or a third state intentionally resulting in a crime in the demanding state; and

(4) Whether the extradition is not for the purpose of enforcing any civil liability.

The third item relates to uniform support matters where the crime is committed in another state, even though the accused has never been in the other state, and that is not a matter that we are concerned with here.

The sole question here is whether the identity of the defendant has been established, and there is substantial credible evidence to that effect; and I must, therefore, deny the application for habeas corpus, and order that Frank Velotta be surrendered to the Florida authorities forthwith.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

(Filed July 23, 1964.)

Now came the Coroner of Cuyahoga County and made return of the writ of habeas corpus heretofore issued in this case, and also brought the body of said Frank Velotta, petitioner herein, and upon hearing of the case the court denied the said writ.

Extradition hearing concluded the court finds proceedings regular in all respects and orders that Frank Velotta shall be turned over to agents of State of Florida forthwith, for extradition to said State.

It is further ordered that execution is to be stayed for twenty days pending filing of notice of appeal. Defendant may be released on same bond of $2000.00 for said twenty days and while appeal is pending in the Court of Appeals.

JOURNAL ENTRY OF THE COURT OF APPEALS.

(Entered April 24, 1965.)

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellants and therefore the judgment of the Court of Common Pleas is affirmed. It is ordered that appellee recover of the appellant its costs herein expended.

It is further ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

ORDER OF THE SUPREME COURT OVERRULING MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD.

(Entered October 6, 1965.)

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT DENYING REHEARING.

(Entered November 3, 1965.)

It is ordered by the Court that rehearing in this case is denied.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
FEB 24 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 946.

FRANK VELOTTA,
Petitioner,

vs.

JAMES J. McGETTRICK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County,
DENNIS J. McGUIRE,
Assistant Prosecuting Attorney,
Criminal Courts Bldg.,
Cleveland, Ohio 44114,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

TABLE OF CONTENTS.

Statement of the Case ---------- 2

Argument and Law ---------- 5

Conclusion ---------- 8

TABLE OF AUTHORITIES.

Cases.

Biddinger v. Commissioner of Police, 245 U. S. 128, 62 L. ed. 193 ---------- 6

Harris, In re, 170 Ohio St. 151 ---------- 5

Mainer v. State, 92 Ohio Law Abs. 251, 194 N. E. 2d 167 (1961) ---------- 7

Statutes.

Ohio Revised Code, Section 2963.18 ---------- 6

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 946.

FRANK VELOTTA,

Petitioner,

vs.

JAMES J. McGETTRICK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed without writing an opinion. The Ohio Supreme Court refused to certify and review.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

STATEMENT OF THE CASE.

Frank Velotta, the petitioner herein, along with James Colavecchio and Pasquale Cisternino, was charged in Palm Beach County, Florida, with breaking and entering the Publix Super Market, Inc., located on the South Dixie Highway, in West Palm Beach, on February 16, 1964. Velotta fled Florida immediately thereafter and returned to Cleveland. The Governor of Florida submitted to the Governor of Ohio an executive requisition demanding the inter-state rendition of Velotta. After a hearing in the offices of the Governor of Ohio, the Governor determined that the demand for extradition should be complied with and signed a warrant for Velotta's arrest. A hearing was had before the trial court on the fugitive warrant, after which Velotta filed a petition for a writ of habeas corpus. At the hearing on the petition, counsel for the petitioner stated that the petitioner contends that he was never a resident of the County of West Palm Beach, Florida, never a fugitive, and that he was not present in that county at or about the time indicated. At the conclusion of the testimony and arguments of counsel, the court ordered Velotta surrendered to the Florida authorities. Upon appeal to the Eighth District Court of Appeals, the judgment of the trial court was affirmed.

The testimony the State offered at the hearing to establish that the defendant Frank Velotta was in the State of Florida and in the county where the crime was alleged to have occurred at or about the time alleged is substantially as follows:

Richard Lee Sheets, a patrolman for the City of West Palm Beach, Florida, went on duty at 11:00 p.m. on the night of February 15, 1964. That night he saw Frank Velotta under circumstances he described as follows (R. 18):

"I had first observed a vehicle drive from a shopping center on the south end of our city, * * *

"The car drove from the shopping center, from the south end of our city, and I fell in behind, and I observed that it was a rental type from Duval County, Jacksonville, Florida—and three white males—and I followed them for about nineteen blocks, where I stopped them for investigation."

Patrolman Sheets had the car stopped for exactly eleven minutes. (R. 33.) He asked them their names and learned they were Pasquale Cisternino, James Colavecchio, and Frank Velotta. Velotta, whom the patrolman identified in the courtroom, was sitting in the right front passenger's seat. When asked his name and where he lived, Velotta said he was from Cleveland and said he was Frank Velotta. (R. 19.)

On cross examination, officer Sheets was asked if he saw some photographs of Velotta. He answered that he had seen some photographs—he was not certain whether six or seven—shown him on February 24 by Det. Lt. Baumboughton. He identified Velotta on one of the photographs. When he questioned the three men he wrote down the names of Cisternino and Colavecchio but he did not write down Velotta's name. Cisternino was driving and Colavecchio was supposed to have made the rental agreement for the car. He spent a few minutes talking with Velotta at that time. The place where he stopped the car was on the main street of the town and was a well lighted area directly in front of a supermarket. (R. 27.)

William Earl Martin, a police officer for the City of West Palm Beach, was on duty from approximately 8:30 p.m. on February 15 to 4:30 the next morning, driving a special detail run. He identified Frank Velotta as the person he had seen in the course of his duties at approxi-

mately 12:25 a.m. inside a hatch on the roof of the Publix Super Market. The hatch was about four feet square and was located at about the middle of the roof of the Super Market, about eight feet from the rear wall. Officer Martin lifted the hatch preparatory to going down inside. Looking down, he saw Frank Velotta about three feet from the top of the hatch on the ladder that leads to the inside of the store from the roof. The officer jumped back and drew his gun, then stepped to the hatch again. Velotta was gone. The officer had spotlights shining down the hatch and when he saw Velotta down in the hatch the spotlights were on Velotta. Colavecchio was found lying on his side about 300 feet away on the roof of the shopping center.

ARGUMENT AND LAW.

The petitioner claims that the trial court erred in refusing to "weigh" the evidence presented at the hearing on the petition for habeas corpus to determine whether the petitioner was in fact in the demanding state (Florida) at or about the time stated in the indictment.

The trial court heard the testimony of a number of witnesses presented by the petitioner in his attempts to prove that he was not a fugitive from justice, that he was in Cleveland, Ohio, when the crime was committed. The petitioner's evidence was directly in conflict with the testimony of the two Florida officers that each of them had seen the petitioner in that city at or about the time indicated, one of the officers even placing him at the scene of the crime. Both officers unequivocally identified the petitioner in the courtroom as the man they saw. The testimony of the petitioner, his wife, and various close relatives and friends that he was at a birthday celebration in Cleveland on the evening of February 15, 1964, therefore presented only a question of alibi.

The trial court noted that the scope of the inquiry in habeas corpus proceedings upon extradition is defined in *In re Harris*, 170 Ohio St. 151, as follows:

> "In each instance, the Governor and the court shall inquire and determine (1) whether an offense is charged under the laws of the state demanding extradition, (2) whether the identity of the party charged is established, (3) whether the party charged is a fugitive from justice * * * and (4) whether the extradition is not for the purpose of enforcing any civil liability."

In denying the application for habeas corpus the court determined that the sole question here is whether the

identity of the defendant has been established, and that there is substantial credible evidence to that effect.

The refusal of the trial court to weigh the evidence of the defendant directed to proving an alibi is in accord with the authoritative pronouncements holding that the court, in habeas corpus proceedings upon extradition, is not required to determine the question of alibi. The scope of the judicial review of a decision of the Governor is stated in *Biddinger v. Commissioner of Police*, 245 U. S. 128, 62 L. ed. 193, at pp. 135-136:

> "This much, however, the decisions of this court make clear, that the proceeding is a summary one, to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest; that when the extradition papers required by the statute are in the proper form the only evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed; and, frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding state."

The Ohio decisions and statute follow the general rule, from which we can find no dissent, that absence from the scene of the crime or an alibi cannnot be shown unless it is probative of the fact that the accused is not a fugitive. Section 2963.18 of the Ohio Revised Code provides:

> "The guilt or innocence of an accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after a demand for extradition accompanied by a charge of crime under section 293.03 of the Revised Code has been presented to the governor, except as it may be involved

in identifying the person held as the person charged with the crime."

The following decision in *In re Mainer, Appellant, v. State, Appellee,* 92 Ohio Law Abs. 251, 194 N. E. 2d 167 (1961) (appeal from denial of a writ of habeas corpus) summarizes and determines issues similar to those presented in the petition herein:

> "Whether or not the petitioner has sufficient evidence to prove an alibi is not for this court to pass upon for the reason that an alibi, if proven, will not warrant the discharge of the petitioner; nor is it the province of this court to pass upon the merits of this case as to the guilt or innocence of the petitioner. The evidence relative to absence of the petitioner from the demanding state at the time of the alleged crime is in conflict, and under all the evidence the trial court determined the question adversely to the petitioner.
>
> "The sole question before us is whether the Governor of the State of Ohio upon whom demand has been made is authorized to grant extradition of the petitioner upon the request of the Governor of the State of Pennsylvania under all these facts.
>
> "Clearly the Governor of Ohio under the papers before us had jurisdiction to issue the warrant. It appears that the claim is that a crime has been charged which in this state is a felony, and there is sufficient credible evidence of the identity of the petitioner, and that he is a fugitive from justice from the demanding state.
>
> "Upon careful review of the orders and judgment of the common pleas court in refusing to discharge on writ of habeas corpus the petitioner who is held in extradition proceedings this court is of the view that there is credible evidence in the record warranting the court's action, and for that reason the judgment of the court of common pleas is affirmed."

CONCLUSION.

In this case the requirements of a judicial inquiry on the subject under consideration were fully met. The petitioner was given an opportunity to be heard and to submit evidence in his behalf. The decision of the trial court, wherein the court denied the application for habeas corpus, was supported by substantial probative evidence establishing the identity of the petitioner.

The petitioner has not shown any deprivation of his constitutional right to due process of law entitling him to review by this Court. The writ should therefore be denied.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

DENNIS J. MCGUIRE,
Assistant Prosecuting Attorney,
Attorneys for Respondent.